

# How Transformative Is Transformative Mediation?: A Constructive-Developmental Assessment

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## I. INTRODUCTION

Few topics have attracted as much attention within the dispute resolution community recently as the notion of “transformative mediation.” Those who have contributed to the growing literature on the subject—whether as proponents, critics, or both—seem to think about “transformation” in at least two ways, both of which focus on the purposes a mediator seeks to serve. Some, like Carrie Menkel-Meadow, think of transformation through mediation as the “creation of more human compassion, understanding, and moral decision making.”<sup>1</sup> Others, like Robert Baruch Bush and Joseph Folger, seek that and something more: “[A] change or refinement in the *consciousness and character of individual human beings*. . . . connot[ing] *individual moral development*.”<sup>2</sup>

Bush and Folger present their approach to transformation through mediation in their 1994 book *The Promise of Mediation*.<sup>3</sup> There they argue that moral development requires a simultaneous “strengthening [of] the self” and a “reaching beyond the self to relate to others,” concepts they refer to as “empowerment” and “recognition,” respectively.<sup>4</sup> Bush and Folger view human moral development as the primary purpose of mediation, and they caution that their approach cannot cross-fertilize with other approaches. If a mediator hopes to promote personal development—as

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<sup>1</sup> Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 236 (1995) (reviewing ROBERT BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* 24 (1994)).

<sup>2</sup> ROBERT BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* 24 (1994).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* at 81, 84.

Bush and Folger believe all mediators should—then one must employ a model that makes “empowerment” and “recognition” its exclusive concerns.<sup>5</sup>

Despite their emphasis on individual moral development, Bush and Folger do not offer a comprehensive theory of human development to support their model. As constructive-developmental psychologist Robert Kegan explains, with the exception of organizational theorist William Torbert,

none of the psychological approaches to conflict resolution—not the efforts of pioneering social psychologists, nor the more recent work of the family therapists or the organization developmentalists—attend to the individual’s development of consciousness. As a result, none of these theorist-practitioners is in a position to consider the demands their respective curricula make on mental capacity or to assess a person’s readiness to engage their designs.<sup>6</sup>

This Article is an initial effort to assess, from a constructive-developmental perspective, the ability of Bush and Folger’s model to

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<sup>5</sup> See *id.* at 108–11.

<sup>6</sup> ROBERT KEGAN, IN *OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE* 321 (1994) [hereinafter KEGAN, IN *OVER OUR HEADS*]. As discussed more fully below, Bush and Folger describe three distinct moral frameworks (or worldviews) upon which they consider various competing models of mediation to be based. BUSH & FOLGER, *supra* note 2, at 242–44; see also Joseph Folger & Robert Baruch Bush, *Ideology, Orientations to Conflict, and Mediation Discourse*, in *NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES* 3, 19–21 (Joseph P. Folger & Tricia S. Jones eds., 1994). Their own model flows from a moral framework they call “relational.” See *id.* Bush and Folger situate the work of developmental psychologist Carol Gilligan within their relational paradigm. Their model’s dual emphasis on “empowerment” and “recognition” appears to be a direct outgrowth of Gilligan’s vision of adult maturity, which values both autonomy and connection. See CAROL GILLIGAN, IN *A DIFFERENT VOICE* 151–74 (1993). Bush and Folger make only fleeting references to Gilligan, who seems to be their only source for developmental theory. See BUSH & FOLGER, *supra* note 2, at 233. It is well known, however, that Gilligan has not provided a comprehensive theory of development over the lifespan, as Kegan has done. See generally, e.g., JOANN WOLSKI CONN, *SPIRITUALITY AND PERSONAL MATURITY* (1989). Kegan’s model of lifespan development considers the benefits and burdens of both autonomy and connection at each stage of development. See generally ROBERT KEGAN, *THE EVOLVING SELF: PROBLEM AND PROCESS IN HUMAN DEVELOPMENT* (1982) [hereinafter KEGAN, *THE EVOLVING SELF*]. Kegan thus avoids Kohlberg’s neglect of connection and privileging of autonomy, which Gilligan is famous for having called to our attention.

promote individual moral development. Putting aside for the time being important questions about the purposes of mediation,<sup>7</sup> I ask instead, “How well does transformative mediation serve its express goal of promoting human moral development?”

I focus on Bush and Folger’s model for two reasons. First, as mentioned earlier, Bush and Folger’s transformative aspirations appear to be more ambitious than those of many others who seek some form of individual or relational “transformation” through mediation. As explained more fully below, if Bush, Folger, and others truly hope to promote individual moral *development* as their primary purpose, as opposed to (or in addition to) more civil and integrative resolutions of isolated disputes, their models should be informed by a theory of human development that covers the entire lifespan, and their practices should be responsive to the particular developmental resources and limitations of the specific parties whom they seek to assist. Second, Bush and Folger’s approach has become the most widely discussed and practiced form of mediation aimed principally at altering relationships and self-understandings, as opposed to “solving the problem” by reaching agreement.<sup>8</sup> Given the growing popularity of their approach, particularly among practitioners, it is important that those who make use of it appreciate its potential limitations.

Part II of this Article is devoted to a general discussion of constructive-developmental psychology and the three most common stages of adult development, as described by Robert Kegan, constructive-developmentalism’s leading theorist, and his colleagues. In Part III, I offer a reformulation of the concept of “transformation” in relation to mediation efforts intended to promote individual development. I describe Bush and Folger’s approach to mediation in greater detail in Part IV, analyzing it from a constructive-developmental perspective. My goal is to determine the

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<sup>7</sup> With respect to the question of mediation’s goals and purposes, as well as Bush and Folger’s social program, I am in essential agreement with the views expressed by Carrie Menkel-Meadow in her 1995 review of *The Promise of Mediation*. See generally Menkel-Meadow, *supra* note 1. In particular, I believe “transformative” purposes—including mediator moves and responses that tend to support a party’s ongoing development—often can mix fruitfully with problem solving and other purposes. In fact, the types of activities typically associated with problem solving mediation are essential to development for some parties. As a result, a mediator who has no particular “transformative” objectives—or who even rejects the notion that moral development can or should be an important purpose of mediation—may nonetheless unwittingly provide support for the ongoing development of some parties. This topic is discussed more fully below.

<sup>8</sup> See BUSH & FOLGER, *supra* note 2, at 2.

“transformative potential” of their approach in light of the mental demands it makes upon disputants. I conclude that Bush and Folger’s model—at least as it presently is conceived—is no more supportive of individual moral development than the most common form of what Bush and Folger refer to as “problem-solving mediation.”<sup>9</sup> But, my intention is to be constructive and not merely critical. As I discuss in Part V below, an appreciation of the dynamics of human development may increase a mediator’s efficacy, regardless of his espoused orientation to practice. In Part VI, the final Part, I briefly discuss two significant impediments to use of constructive-developmental theory in mediation practice.

## II. CONSTRUCTIVE-DEVELOPMENTAL THEORY

Constructive-developmental psychology is an empirically-supported<sup>10</sup> theory of human development. It focuses on the underlying motion and logic of development, thereby providing insight into a wide spectrum of human experience. Its tap root is the pioneering work of the late biologist-philosopher Jean Piaget, whose primary interests were the cognitive and moral development of children.<sup>11</sup>

In one of his most famous experiments, Piaget asked children of different ages to pour a quantity of liquid from a tall, thin beaker into a short, fat beaker. When asked which beaker contained (or had contained) the greater quantity of liquid, younger children pointed to the tall beaker. Older children knew that the amount of liquid remains constant, regardless of the size and shape of its container. Piaget’s experiment vividly confirmed what many parents and school teachers already know: children make sense of their experience in increasingly complex and subtle ways as they develop.<sup>12</sup> Piaget ultimately identified a series of childhood and adolescent stages of development, each representing a qualitatively different, and progressively more sophisticated, way of making sense out of

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<sup>9</sup> See *id.* at 55–77. My conclusions are not the product of empirical research, though presumably they could be tested using the research methodology developed by Kegan and his colleagues. See generally LISA LAHEY ET AL., A GUIDE TO THE SUBJECT-OBJECT INTERVIEW: ITS ADMINISTRATION AND INTERPRETATION (1988).

<sup>10</sup> See discussion *infra* note 20.

<sup>11</sup> See generally JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1948) [hereinafter PIAGET, THE MORAL JUDGEMENT OF THE CHILD]; JEAN PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (1952) [hereinafter PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN].

<sup>12</sup> See KEGAN, THE EVOLVING SELF, *supra* note 6, at 28.

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one's experience.<sup>13</sup> Lawrence Kohlberg, one of Piaget's students, extended Piaget's work in the realm of moral development, adding to it the study of adult moral development.<sup>14</sup>

Kohlberg's student Robert Kegan, building upon the work of Piaget, Kohlberg, and others, constructed a developmental theory that covers the entire lifespan. Prior to the publication of Kegan's work and that of a handful of others, there had been relatively little recognition of the fact that adults may undergo qualitative psychological transformations postadolescence. The changes that occur in adulthood traditionally

were thought to be of a different order, nonregular, and essentially derivative of the fundamental psychological work of earlier years. It is probably safe to say that this is no longer the predominant view of psychological adulthood. While there will always be controversy regarding the role of early experience in the present, and no one suggests there is not enormous variation in possible life courses, there is an emerging picture of adulthood *continuing* a lifelong history of qualitative psychological organizations which, underneath the surface variety, have remarkable regularities.<sup>15</sup>

Kegan's theory, unlike others,<sup>16</sup> focuses on the underlying motion of development. It views developmental progress in adulthood as the product of a variety of conditions, experiences, and influences, rather than being strictly determined by age or other invariable characteristics.<sup>17</sup> This makes it well suited for use in assessing the extent to which a given conflict resolution process supports a person's ongoing development. If one believes, for instance, that developmental progress is age-determined, there

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<sup>13</sup> See PIAGET, *THE MORAL JUDGEMENT OF THE CHILD*, *supra* note 11, at 29-50.

<sup>14</sup> See generally LAWRENCE KOHLBERG, *COLLECTED PAPERS ON MORAL DEVELOPMENT AND MORAL EDUCATION* (1975); Lawrence Kohlberg, *Stage and Sequence: The Cognitive Developmental Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION: THEORY AND RESEARCH* 347 (David A. Goslin ed., 1969); Lawrence Kohlberg & R. Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, 12 *HUM. DEV.* 93 (1969).

<sup>15</sup> Robert Kegan & Lisa Laskow Lahey, *Adult Leadership and Adult Development: A Constructivist View*, in *LEADERSHIP: MULTIDISCIPLINARY PERSPECTIVES* 199, 200 (Barbara Kellerman ed., 1984).

<sup>16</sup> Age oriented, or phasic, theories are among the most prominent competing theories of adult development. See generally DANIEL J. LEVINSON, *THE SEASONS OF A MAN'S LIFE* (1978).

<sup>17</sup> See Kegan & Lahey, *supra* note 15, at 200-02.

is little point in asking whether and how one approach to mediation might promote development relative to another.

Constructive-developmentalism charts at least five successive stages of development—the “qualitative psychological organizations” referred to above in the quoted material. The vast majority of adults occupy one of the later three stages, or are transitioning between two of them.<sup>18</sup> The theory encompasses not only the realms of cognition and moral reasoning, but also affect.<sup>19</sup> During the past twenty years, Kegan, his colleagues, and others have conducted numerous longitudinal studies of adults in a variety of contexts. This research has produced a rich topography of three of the potential stages of adult development and of the transitions between them.<sup>20</sup>

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<sup>18</sup> See KEGAN, *IN OVER OUR HEADS*, *supra* note 6, at 187–97.

<sup>19</sup> See KEGAN, *THE EVOLVING SELF*, *supra* note 6, at 15.

<sup>20</sup> I say *potential* stages of adult development because Kegan’s and others’ research indicates that progress along the developmental continuum is not automatic or guaranteed. And, in contrast to the childhood transitions, there are no easily specifiable age norms for the adult developmental transitions. Most people begin to construct their experience at the first of these stages of development, the “interpersonal stage,” during adolescence. This stage of development may persist into (or, in a relatively small number of cases, only be reached in) chronological adulthood. Research suggests that, at present, approximately 14% of U.S. adults are at the interpersonal stage of development. This same research indicates that approximately 32% of adults are navigating the shift from the interpersonal stage to the next stage of development, the “institutional stage.” The institutional stage accounts for about 34% of all adults. Another six percent are transitioning from the institutional stage to the final stage in Kegan’s model, the “interindividual stage,” which an even smaller number of adults actually have reached. See KEGAN, *IN OVER OUR HEADS*, *supra* note 6, at 192–93; see also discussion *infra* Part II.A (discussing these three stages of development). There is evidence of further stages of adult development. See, e.g., Susanne R. Cook-Greuter, *Rare Forms of Self-understanding In Mature Adults*, in *TRANSCENDENCE AND MATURE THOUGHT IN ADULTHOOD* 119 (Melvin E. Miller & Susanne R. Cook-Greuter eds., 1994). Given the comparatively small number of adults who are fully settled in the interindividual stage of development, as well as their facility for coping constructively with conflict, I have focused my discussion on the first two stages of adult development identified by Kegan. I also have chosen not to address issues related to the relatively small number of adults—no more than about 13% according to various studies—that have not yet reached the interpersonal stage of development. See KEGAN, *IN OVER OUR HEADS*, *supra* note 6, at 193.

I have no information about the racial, ethnic, socioeconomic, or other demographic stratifications represented in these studies, other than awareness that the gender mix was approximately 67% female and 33% male. See *id.* Factors like race and income may have an important influence on individuals’ access to contexts and experiences, like higher education, that may be supportive of their development,

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As explained in detail below, each of these stages amounts to a qualitatively different way of understanding, or “making meaning” about, oneself in relation to others.<sup>21</sup> Constructive-developmentalism is not as concerned with what one knows as it is with the preconscious organizing principles that condition *how one makes sense out of what one experiences and knows*.<sup>22</sup> It is “constructive” because it is concerned with the ways that people are predisposed to think and feel about their diverse experiences and perceptions; that is, how they organize them into a meaningful whole.<sup>23</sup> In a sense, constructive-developmentalism attempts to “map the maps” by which people make sense out of their experience (which, of course, influences the types of experiences they seek and avoid). It is “developmental” because it recognizes that the ways people make meaning, as well as the behaviors that flow from these ways of making meaning, are susceptible to ongoing transformation.<sup>24</sup>

Constructive-developmentalism is not simply describing individual variations in intelligence, styles, preferences, or similar characteristics. To make an imperfect analogy to computers, the capabilities of a particular configuration of hardware limit both the types and amount of data a computer can process and the ways in which it can organize, or “make sense” out of, that data. Within its limitations, the computer can “learn” to perform new tasks by being provided with new instructions in the form of new or revised operating instructions (programs). There are some instructions that the computer is incapable of executing—some software exceeds the hardware’s capabilities—but the computer’s limitations are not a problem so long as the demands placed on it do not exceed those limitations. Problems arise, however, when users demand that the computer perform in ways that it neither can perform, nor learn to perform.

Constructive-developmental psychology holds that individuals labor under similar limitations, including limitations on the ways one is able to construct—or make sense of—one’s interaction with others. And, while most people (unlike most computers) *can* learn, they frequently learn slowly and with great difficulty, particularly when the learning required is

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including development past the interpersonal stage. Accordingly, the statistics set forth above may not be representative of developmental stratification among adults in the United States, where the studies were conducted.

<sup>21</sup> See Kegan & Lahey, *supra* note 15, at 202–05.

<sup>22</sup> See *id.* at 202.

<sup>23</sup> See *id.* at 202–03.

<sup>24</sup> See *id.* at 203.

the acquisition of an entirely new way of understanding oneself and making sense out of one's experiences.<sup>25</sup>

These developmental limitations, have important consequences for conflict management. Research by constructive-developmental theorists provides insight into individuals' experiences of conflict and their internal resources for dealing with it at each developmental stage. This research is significant because it can help conflict resolution theorists and practitioners understand the psychological resources and limitations people bring to a given conflict—and to any process designed to contribute to its resolution. Adults in conflict may be employing one or more qualitatively different, developmentally conditioned ways of making sense of their interactions, all without any awareness that this is occurring.

### A. *Three Stages of Adult Development*

What is the interior landscape of each adult stage of development and how are we to understand the transitions between them? As Kegan and Lahey explain, "[d]evelopment is always a process of outgrowing one system of meaning by integrating it (as a subsystem) into a new system of meaning. What was 'the whole' becomes 'part' of a *new* whole."<sup>26</sup> The transition from one stage to the next occurs as one's current way of understanding oneself and one's experiences—that is, the way of making meaning one presently is preconsciously *subject to*—progressively becomes an *object* on which one can reflect.<sup>27</sup> These transitions typically occur slowly and often painfully as one confronts and becomes increasingly conscious of the fact that one's existing way of understanding oneself, and thus one's way of relating to others and functioning in the world, are inadequate to the demands made by life's circumstances and others with whom one relates.<sup>28</sup> When the transition from one stage to the next is complete, one enjoys a new sense of agency because one is free from psychological constraints and predispositions that flow from the prior meaning system's limitations. In effect, one acquires a new self before which the demands and dilemmas of the old self can be brought for resolution.

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<sup>25</sup> See KEGAN, IN OVER OUR HEADS, *supra* note 6, at 187–88.

<sup>26</sup> Kegan & Lahey, *supra* note 15, at 203.

<sup>27</sup> See Robert Kegan et al., *The Psychologic of Emotion: A Neo-Piagetian View*, in EMOTIONAL DEVELOPMENT 105, 114 (Dante Cicchetti & Petra Hesse eds., 1982).

<sup>28</sup> See KEGAN, IN OVER OUR HEADS, *supra* note 6, at 187–88.



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The remainder of this Part consists of brief descriptions of the three most common stages of adult development, including some of the implications of each for an individual's experience of conflict. These descriptions present "pure types," and the reader should bear in mind that many adults are transitioning between two of these stages at any given moment. Those undergoing a transition between stages are, to varying degrees, less subject to the prior stage's limitations and more possessed of the subsequent stage's strengths than someone fully embedded in the prior stage. These brief descriptions fall short of capturing the full richness and complexity with which constructive-developmental psychology presently is capable of describing adult experience, but they should provide a sufficient basis for tentatively assessing the ways in which Bush and Folger's approach to mediation may and may not be capable of contributing to adult moral development. The first two stages of adult development described below tend towards opposite ends of a continuum. Individuals at one end of the continuum are over identified with others; at the other end, a person's ego boundaries are comparatively rigid and well-guarded. Thus, the hallmark of the *interpersonal stage* of development is an embeddedness in one's relationships and a corresponding inability to think and act with genuine autonomy. An individual at the interpersonal stage relies greatly on others' approval or disapproval in decisionmaking and, more generally, in his or her own self-assessment. The hallmark of the *institutional stage* of development is the very autonomy that the interpersonal self lacks. And, as we shall see, the tension between identification with others and differentiation from them is largely resolved at the *interindividual stage* of development. Table 1, below, summarizes each of the three stages.

### 1. *The Interpersonal Stage*

*After three long mediation sessions, Karen and Jim had discussed their most important concerns and feelings about their pending divorce. They had explored many possibilities for resolution of the contested issues that the court will decide if they cannot reach an agreement—child custody, property division, taxes, alimony, and support. Near the end of the present session, Karen makes a settlement offer that she believes strikes a fair balance between their respective needs and concerns. Jim acknowledges that Karen's offer reflects the consensus that has been developing between them, but he is paralyzed by indecision. Turning to the mediator, Jim says, "I guess this is fair. I just don't know what to do. What do you think I should do? If you think it makes sense, I'll go with it."*

Mediators who handle disputes between individuals—particularly individuals unrepresented by counsel—are frequently faced with requests like Jim's. There are many possible reasons for his request. We might, for example, expect a party with little awareness of standards of fairness commonly used to resolve the distributive issues in divorce negotiations to seek this information when evaluating a settlement offer. Many experienced divorce mediators would be well-positioned to provide this information. But, Jim appears to be seeking more than information from the mediator. He seems to want to defer to the mediator's judgment—to have the mediator make the decision for him. Many adults faced with such a major decision at a traumatic moment like this one would feel a similar impulse. Yet, many of these same adults would not be content, in the final analysis, to defer to another's judgment. Jim's seeming inability to be the author of his own life at this critical moment typifies one of the principal limitations experienced by many adults at the interpersonal stage of development.

An adult at the interpersonal stage of development is attuned to others in a way that a child (or adolescent) at the immediately prior stage of development is not. Children and adolescents who have not reached the interpersonal stage of development are unreflectively (and therefore totally) identified with, or subject to, their own needs, desires, and purposes.<sup>29</sup> Prior to the interpersonal stage, children and adolescents are capable of pursuing their own objectives, but they are incapable of genuinely integrating them with others' objectives. When their objectives align with others' objectives, cooperation is possible; when they do not, tantrums and adolescent resistance result.<sup>30</sup>

Growth to the interpersonal stage of development, which typically begins in adolescence and can continue into late adulthood, removes this obstacle to interpersonal coordination. One can now consider and attune oneself to others' perspectives, which affords one a greater sense of social integration. The ability to experience others as something more than obstacles or means to the fulfillment of one's own purposes is a definite strength of interpersonalism, as it enables the synchronization of one's needs, desires, and purposes with others'.<sup>31</sup>

But, as with the other developmental stages, the interpersonal stage's primary limitation is the flip side of its principal strength. An adult at the interpersonal stage of development, in a very real sense, *is* her

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<sup>29</sup> See Kegan & Lahey, *supra* note 15, at 203.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

relationships. Just as the individual at the prior stage is embedded in, and therefore cannot take a perspective on, her needs, desires, and purposes, the adult at the interpersonal stage of development is embedded in her relationships. One is incapable of gaining distance from them and thus lacks the ability effectively to regulate the conflicting demands made by the various participants in what amounts to an internal conversation comprised of the others' voices that have become one's own.<sup>32</sup> At the interpersonal stage, "[o]ne's self-definitions, purposes, and preoccupying concerns are essentially *co*-defined, *co*-determined, and *co*-experienced."<sup>33</sup> As a result, an adult at the interpersonal stage of development is likely to be highly reliant upon the perspectives of others in matters both personal and professional, whether the others merit such reliance or not. In short, the interpersonal self lacks sufficient agency to think and act with genuine independence.<sup>34</sup> This may explain why Jim, in the example above, turns to the mediator seeking direction about what to do.

An adult at the interpersonal stage of development is essentially unable to differentiate himself fully from his social surround. One naturally knows that one exists as a separate person, but one is highly dependent upon others' approval or disapproval for one's own sense of self. In effect, one is "made up by" one's relationships. And, the interpersonal self often is most influenced by those relationships which arise out of the sharing of physical space.<sup>35</sup> While one may be able to remain loyal to people not immediately present—assuming, that is, that the absent parties are people with whom one has significant face-to-face contact—relationships with those in one's immediate presence, like a mediator and other parties to a mediation, are powerfully influential. People at the interpersonal stage of development often appear to be indecisive, impressionable, or to lack self-esteem.

An adult at the interpersonal stage of development can internalize others' competing feelings and perspectives from context to context, but she lacks the ability to resolve inconsistencies among them.

[The interpersonal self's] ambivalences or personal conflicts are not really conflicts between what I want and what someone else wants. When looked into they regularly turn out to be conflicts between what I want to do as a part of this shared reality and what I want to do as a part of that

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<sup>32</sup> See *id.* at 203–04.

<sup>33</sup> *Id.* at 203.

<sup>34</sup> See *id.* at 203–04.

<sup>35</sup> See KEGAN, *THE EVOLVING SELF*, *supra* note 6, at 58.

shared reality. To ask someone in this evolutionary balance to resolve such a conflict by bringing both shared realities before herself is to name precisely the limits of this way of making meaning. "Bringing before oneself" means not being subject to it, being able to take it as an object, just what this balance cannot do.<sup>36</sup>

An adult at the interpersonal stage of development may be highly adept at emphatically considering and relating to others' feelings and perspectives, yet this very ability can create an internal conflict that may be very difficult or impossible for one to resolve independently. An adult at this stage of development can "be aware of shared feelings, agreements, and expectations that take primacy over individual interests,"<sup>37</sup> but he cannot stand apart from his relationships in order to regulate them or to regulate the "relationships between relationships."<sup>38</sup> Adults at this stage of development may have great difficulty articulating and asserting "their own" interests and perspectives, because their interests and perspectives are not fully self-originating, but largely received from others. In the example above, Jim may be unable to resolve the conflicting claims he feels are made upon him by his (soon-to-be former) wife, children, and perhaps others (e.g., parents or close friends). The deference he shows the mediator may be an effort to enlist an external authority to help him resolve his inner conflict.

## 2. The Institutional Stage

*Susan and Mike are business partners whose personal and professional animosities are threatening to capsize a lucrative enterprise that they have built over many years. They agreed to hire a mediator to help them try to resolve their differences before dissolving their partnership. After an initial period of sometimes heated exchange about past events, and much reciprocal perspective-taking that was encouraged by the mediator in joint and private sessions, Susan says, "Okay, Mike, now I understand how you see things and you understand how I see them. We each have our point of view, and now I understand yours much better. But, if we're going to get anywhere, we're going to have to find some way to satisfy your priorities and mine, because it's clear that neither one of us is going to give in to the other."*

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<sup>36</sup> *Id.* at 96.

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

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Adults at the institutional stage of development have emerged from a heavy dependence upon others for their self-definition and therefore enjoy a high degree of autonomy and self-expression.<sup>39</sup> In the example above, Susan is still able to “get inside” Mike’s perspective—each successive stage retains the competencies enjoyed at the prior stage—but Mike’s perspective is no longer *inside her*. She can take Mike’s perspective while separating herself from it. The shift from the interpersonal to the institutional stage involves the gradual emergence from an (unperceived) experience of oneself *as one’s* relationships toward a self-authoring perspective in which one now *has* relationships.<sup>40</sup> It entails the progressive relativization of others’ expectations in favor of “an emerging orientation toward considering ‘what it is I want’ independent of others’ expectations.”<sup>41</sup> Thus, an adult at the institutional stage of development can reliably identify and assert his *own* interests in a way that adults at the interpersonal stage cannot.

Once the shift from the interpersonal stage to the institutional stage is complete, one is able to regulate the competing interpersonal demands and commitments that previously defined oneself.

The person becomes more self-authoring, self-owning, self-dependent, more autonomous—not in the sense of more isolated or separated but in the literal sense of “autonomy,” *self-naming*. Rather than having the pieces of oneself co-owned and co-determined in various shared psychological contexts, the person brings the power of determination into the self and establishes the self as a kind of psychic “institution,” an organization which the self is now responsible for running and regulating. In common language, the person evolves an *identity*.<sup>42</sup>

The institutional stage has obvious strengths. The ability to mediate among interpersonal demands and commitments gives rise to a truly meaningful sense of agency. The institutional self may choose to involve others (whether friends, family, colleagues, or “experts”) in its meaning making, but this is truly a *choice*. One can decide and act independently; one no longer looks *of necessity* to others when crafting one’s “own” perspectives. Susan, in the example with which this subpart begins, would not attempt to delegate her decisionmaking authority to the mediator in the

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<sup>39</sup> See Kegan & Lahey, *supra* note 15, at 204.

<sup>40</sup> See *id.*

<sup>41</sup> Kegan et al., *supra* note 27, at 114.

<sup>42</sup> Kegan & Lahey, *supra* note 15, at 204.

way that Jim attempts to do in the prior example. And, because an adult at the institutional stage of development is capable of regulating the interplay between her various relationships and roles, she also exhibits a level of continuity and stability in self-understanding and self-presentation from context to context that an adult at the interpersonal stage lacks.<sup>43</sup>

Despite its strengths relative to the interpersonal stage, the institutional stage also has limitations. An adult at the institutional stage of development is vulnerable to whatever threatens his autonomy and self-control.<sup>44</sup> One is paradoxically enslaved to one's own autonomy and unable to reflect meaningfully on the purposes for which that autonomy is being exercised. One's overriding concern is the satisfaction of one's own interests, even if one's interests are highly other-focused.

An adult at the institutional stage of development is beholden to a personal "ideology"—a framework one uses to interpret and evaluate one's social world and to which one thinks the world should conform. Despite one's increased autonomy in relation to those at the interpersonal stage of development, adults at the institutional stage have no ability to think and act autonomously with respect to their "ideologies," despite their awareness of competing frameworks. An adult at this stage of development does not necessarily think of herself as ideological. Indeed, it is possible to construct an identity around an ethic of tolerance and flexibility, in which case one likely will be intolerant of those who are intolerant and inflexible, all the while failing to see the irony of this stance.<sup>45</sup>

The institutional "ideology" may take the form of a self-conscious identification with a conventional scientific, economic, social, or religious worldview. But, it also could be a unique mix of commitments that are peculiar to the individual or shared with a small, informal group of cohorts and which have little relation to wider societal norms and perspectives. One may be extremely challenged when confronted with a perspective that is not aligned with one's own ideology, particularly when persuasive efforts fail (perhaps because the competing perspective is one held by another adult at the institutional stage of development). Having won a hard-fought battle to

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<sup>43</sup> See KEGAN, *THE EVOLVING SELF*, *supra* note 6, at 226–27.

<sup>44</sup> If this sounds a bit like the consciousness of the preinterpersonal, school age child, that is because the various stages alternate back and forth between a tendency toward over differentiation, on the one hand, and over inclusion, on the other, albeit with significantly diminishing degrees of intensity as one further develops. For a helpful discussion of this aspect of the developmental progression, see KEGAN, *THE EVOLVING SELF*, *supra* note 6, at 108–10.

<sup>45</sup> See Kegan et al., *supra* note 27, at 115.

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forge an independent self capable of regulating the competing demands of interpersonalism—creating, in essence, an internal institution, or order, to regulate those demands—one holds on to that order firmly.

Adults at the institutional stage of development seek, in the first instance, to resolve conflict on terms that leave their “ideologies” unaffected. People are viewed as relatively fixed and unchangeable, and their interests concrete, discretely identifiable, and portable from context to context. Conflict is viewed as a problem external to the relationship among the parties, as a “thing” to be solved—preferably through others’ acquiescence, but through compromise where necessary. When compromise is accepted, an adult at the institutional stage of development may view a good resolution as one in which all parties “win” to the maximum extent possible in light of the parties’ finite resources, relatively fixed interests, and any value-creating possibilities presented by the conflict. In economic terms, such a resolution is said to be “maximally efficient” or “Pareto optimal.”<sup>46</sup> A cooperative relationship among parties in conflict is one in which they seek to capitalize on complimentary differences and distribute the resources available for trade fairly.

Kegan illustrates how we might expect two institutional marital partners to speak about their differences:

[O]ur differences are one of the great strengths of our marriage. We . . . have developed a lot of respect for each other’s way of looking at and relating to the world. . . .

. . . We find that our differences are often complementary. . . . Yes, we still fight sometimes. We don’t always listen or consider that there might actually be a whole different take on a matter besides our own that also makes sense. . . . But more often the fights lead to a better result. They make one or both of us come over and take a look from the other one’s point of view, and we see that there’s a good reason why it looks different to the other one. We are a good problem-solving team. . . . We compromise. We take turns. And sometimes we even find a way to create a solution that includes a lot of both of our views. We stopped trying to get the other person to change a long time ago. We are who we are. . . . Our differences are an asset for the most part.

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<sup>46</sup> See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING* 235–50 (1982). Parties at the interindividual stage also may seek Pareto optimal results, but the Pareto frontier—the curve defined by all possible Pareto optimal outcomes—is much more robust for these individuals, because their interests are less fixed and the parties are better able to synchronize them.

Not every problem has a solution, either, and sometimes you just have to live with that. That goes with the territory of two strong people with minds of their own.<sup>47</sup>

There is nothing wrong with this hypothetical couple's experience. They appear to be quite satisfied with their marriage. But, there are limits to the couple's ability to manage conflict, as they themselves acknowledge. Their "creative solutions" satisfy "a lot," but not all, of their interests. And, "sometimes [they] just have to live with" the fact that some problems cannot be "solved."

### 3. *The Interindividual Stage*

*Wendy and Carrie, women in their 50s, are among a small number of participants in a facilitated dialogue on abortion. Both women are long-time activists, though on opposing sides of the debate. Having thoughtfully listened to Wendy and several others who share Wendy's views, Carrie acknowledges her growing ambivalence about the way the debate is framed and carried out. "I used to be so certain that we were 100% right and you were 100% wrong. Now I'm not so sure 'right v. wrong' is the best way to look at the issue. I mean, there are at least two rights here—respect for life and respect for personal autonomy—and recently I find myself deeply moved by stories on both sides of the divide. I personally don't know anymore what I'd think or do if I—or, God forbid, one of my daughters—were faced with an unwanted pregnancy. And, I'm beginning to think that the 'answer' to the broader social question doesn't lie in an 'either/or' solution. I don't yet know what 'the answer'—or answers—will be, but I don't think it should be the product of yet another lawsuit or some grudging compromise. Maybe we don't need an official 'pronouncement' at all, but some changed vision of what the issue is all about, together with ways to collaborate to address it. But what we need more than anything, I suspect, is some new way of understanding what we—I mean all of us—are about in relation to 'the problem.'"*

The shift from the institutional stage of development to the interindividual stage involves the progressive loss of the self-constructed as a unified and coherent institution. The institution and its ideology are in the process of being revitalized in favor of an emerging self-system that ultimately will be capable of genuine critical reflection upon both the

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<sup>47</sup> KEGAN, IN OVER OUR HEADS, *supra* note 6, at 308.



institution and its ideology. With it will come the ability to decide and act in contravention of the former ideology in order to serve superordinate moral principles. If one's moral judgment should coincide with the purposes suggested by the former self's ideology, one certainly could choose to act in accordance with that ideology. But, this truly is a *choice*. The institutional order thus becomes one "system" alongside others that an adult at the interindividual stage of development is capable of containing, evaluating, and mediating among.<sup>48</sup> As the above example suggests, an ardent "pro-life" or "pro-choice" activist transitioning to the interindividual stage might begin to find herself more open and sensitive to the full moral, psychological, and socioeconomic complexity attending the abortion debate, as well as the full diversity of (sometimes contradictory) views *within* herself. She might begin to acknowledge corners of herself that resonate, however slightly, with perspectives she formerly dismissed. This shift implies a radical loss of certitude about things previously taken for granted (e.g., roles and duties). It signals the loss of the clearly-defined and well-bounded identity that formerly provided one's sense of self.

No longer subject to the institutional self's exclusive investment in a particular ideology, the interindividual self is able to coordinate among a multitude of systems of meaning, both internally and interpersonally. And,

[t]he capacity to coordinate the institutional permits one now to join others not as fellow-instrumentalists[, as is typical of the preinterpersonal stage,] nor as loyalists[, as is typical of the institutional stage], but as individuals—people who are known ultimately in relation to their actual or potential recognition of themselves and others as value-originating, system-generating, history-making individuals. The community is for the first time a "universal" one in that all persons, by virtue of their being persons, are eligible for membership. The group which this self knows as "its own" is not a pseudo-species, but the species. One's self is no longer limited to the mediation and control of the interpersonal (the self as an institution) but expands to mediate one's own and others' "institutions." If the construction of the self as an institution brought the interpersonal "into" the self, the new construction brings the self back into the interpersonal. The great difference between this and [the interpersonal stage] is that there now is a "self" to be brought to, rather than derived from, others; where [the interpersonal stage involves] a fused

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<sup>48</sup> See KEGAN, *THE EVOLVING SELF*, *supra* note 6, 118–20.

commingling [the interindividual stage is characterized by] a commingling which guarantees distinct identities.<sup>49</sup>

The ego boundaries of an adult at the interindividual stage of development now are more fluid and permeable but without threat of loss of one's own identity through over-identification with others. One becomes aware of, and even finds strength in, one's own incompleteness, including the failure of one's existing perspectives and preferences adequately to account for the full range of one's own and others' experiences. One is open to, and even welcomes, experiences that expose, and facilitate correction or expansion of, one's present perspectives and preferences. One becomes capable of a level of interpersonal attunement and genuine, nonjudgmental curiosity in social encounters that an adult at the institutional stage of development lacks, because defense of one's ego boundaries is an end in itself.

An adult at the interindividual stage of development is also able to relativize, and thus evaluate, the assumptions, values, and historical and cultural circumstances that underlie the institutional ideology. This does not imply a lack of moral fortitude or an inability to thoughtfully discriminate among competing choices.<sup>50</sup> Indeed, one has greater moral agency, because one now may choose to serve moral principles that do not accord with one's former ideological biases. The institutional ideology now can be viewed *and treated* as one meaning making system among others. To say that the institutional ideology is relativized is not to say, however, that it necessarily is disregarded. In most cases, it will remain an important source of meaning. As Kegan explains, "[t]he hallmark of every rebalancing is that the past, which may during transition be repudiated, is not finally rejected but reappropriated."<sup>51</sup> One's *relationship* to the institutional system of meaning changes. The maintenance of the system is no longer an end in itself. Thus, one has a new ability to bring inside oneself, incorporate, and coordinate among meaning systems that one previously could understand on a cognitive level, but which one could not possibly embrace.

One's conception of self and other is no longer dichotomous, but dialogical—not self/other (implying sharp division), but self-and-other (interpenetrating; distinct but not separate). The defining characteristic of one's understanding of the self and other is reciprocity.

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<sup>49</sup> *Id.* at 104–05.

<sup>50</sup> See KEGAN, IN OVER OUR HEADS, *supra* note 6, at 331.

<sup>51</sup> KEGAN, THE EVOLVING SELF, *supra* note 6, at 104.

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Reciprocity now becomes a matter of at once mutually preserving the other's distinctness while interdependently fashioning a bigger context in which these separate identities interpenetrate, by which the separate identities are co-regulated, and to which persons invest an affection supervening their separate identities.<sup>52</sup>

Thus, an anthropologist at the interindividual stage of development would be unlikely to conceive of her task simply as "me reporting on the host culture from the perspective of my own," all the while maintaining sharp distinctions between "the host culture" and "my own," "my hosts" and "me." She would not observe local custom or participate in rituals merely out of respect or with an academic curiosity the main purpose of which is to discern what meaning others may see in them (as important as both these motivations might continue to be). She also would be open to what meaning might exist there *for her*—how the ways others make meaning might be incorporated into her own meaning making. She would be attentive to the ways in which these experiences permeate and affect her own sense of self. And, we might expect whatever new self-understanding she arrives at to be reflected in her account of her research. Just as a physicist cannot observe an event without altering it, so the anthropologist at the interindividual stage of development cannot interact with a culture—whether around the globe or around the corner—without the prospect of *it altering her*. The other culture remains "other" in the sense of being distinct, but it is no longer other in the sense of being fully separate.<sup>53</sup>

For the adult at the interindividual stage of development, conflict suggests that one may be holding on too tightly to a cherished perspective, as illustrated by another of Kegan's hypothetical marital discourses:

When we're at our very best, . . . we are able to stop pretending that [our] differences and opposites can only be found in the *other* person, or that the battles we get into are only with the other person. We realize that this polarizing or dichotomizing serves a purpose for each of us, and we are less enamored with that purpose. We see it's not the whole truth.

When we are at our best, we get a good glimpse at the fact that the activist, for example, also has a contemplative living inside him. The one who is strict with the kids has a part of herself that has a whole other, looser way of feeling about them. . . . [O]ur favorite fights are the ones in which we don't try to solve the conflicts but let the conflicts "solve us,"

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<sup>52</sup> *Id.* at 253–54.

<sup>53</sup> This example is adapted from an example that Kegan uses in his Harvard class on adult development.

you could say. We mean by that that if a conflict doesn't go away after a while we've found it's a good bet that one of us, or both of us, has gotten drawn back into being too identified with our more comfortable position. Like the end we're holding onto so passionately is our whole story, our whole truth in the matter. When we can get out of the grip of our more familiar side then the fight doesn't feel as if the other one is trying to make us give up anything. The fight becomes a way for us to recover our own complexity, so to speak, to leave off making the other into our opposite and face up to our oppositeness.<sup>54</sup>

Viewed from the interindividual perspective, conflict "resolution" does not involve efforts to come quickly to an agreement that leaves one's current self-understanding, and the assumptions which support it, unexamined.

**Table 1. Three Stages of Adult Development**

	One can objectify . . .	But is subject to . . .	Principal Strengths	Principal Limitations
<b>Interpersonal Stage</b>	<i>own needs, desires, and purposes</i>	<i>interpersonal relationships as source for defining "own" needs, desires, purposes, and sense of self</i>	<i>ability to consider and attune to others' perspectives and to coordinate with others' needs, desires, and purposes</i>	<i>"own" interests, etc. derivative of others'; seemingly indecisive, impression- able, lacking genuine self-agency</i>
<b>Institutional Stage</b>	<i>one's relationships and others' feelings, needs, desires, and purposes</i>	<i>own identity; "ideology" in form of personal value system to which one wishes the world to conform</i>	<i>strengths of prior stages, plus ability to identify and assert separate needs, desires, and purposes; genuine self- agency; stable self- understanding and self- presentation</i>	<i>inability to reflect mean- ingfully on purposes for which one's autonomy is exercised; con- flict resolved without sufficient reflection on elements of one's self- understanding that tend to produce it</i>

<sup>54</sup> KEGAN, IN OVER OUR HEADS, *supra* note 6, at 309-10.

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Inter-individual Stage	<i>own and others' institutional "ideologies"</i>		<i>strengths of prior stages, plus ability to reflect critically on and act independently of one's "ideology"; conflict viewed as opportunity for enhanced self-understanding</i>	
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### III. TRANSFORMATIVE CONFLICT INTERVENTION

I suggested earlier that the term "transformative," as currently used in much of the dispute resolution literature, seems to have at least two meanings. It sometimes refers to approaches to intervention that seek to promote mutual understanding among the parties, as opposed to simply reaching agreement. At other times, it means that and something more. As indicated above, Bush and Folger believe their approach also supports disputants' moral growth.<sup>55</sup> Their goal is to create a context in which conflict is addressed through opportunities for personal development—for whatever benefit that may have for this and other conflicts in which the parties, separately or together, may be involved.

We might call the first type of transformation "situational transformation" and the latter type "developmental transformation." Situational transformation occurs where a party makes use of pre-existing perspectives or abilities in a manner that positively influences the present conflict, for example, by demonstrating empathy for another person's predicament. Developmental transformation occurs where a party begins to cultivate, or more securely internalizes, *new* perspectives and abilities—perspectives and abilities indicative of a further stage of development. Accordingly, I propose that *an approach to mediation is developmentally transformative if it tends to support parties' growth from their current stage(s) of development to the next.* An approach to mediation is

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<sup>55</sup> See BUSH & FOLGER, *supra* note 2, at 24.

transformative in this sense if it contributes, however much or little,<sup>56</sup> to a party's growth to a new stage of development—one which provides the person with new psychological resources for managing conflict (and other life experiences), as opposed to simply encouraging more productive ways of using one's present, limited resources, however valuable that may be.

This reformulation of the notion of transformative conflict intervention suggests that the transformative potential of a given approach to mediation is not merely a function of process design; it is also a function of a person's capacity to benefit from the design in developmental terms. *A process that supports developmental transformation for one person may hold no transformative potential for another.* As I try to demonstrate below with respect to Bush and Folger's model, constructive-developmental theory suggests that any approach to developmental transformation that does not adapt itself to the parties' respective developmental resources and limitations may at best promote the development of some adults, while providing no *developmental* benefit to others. And, it may promote the development of this smaller group of adults no better than other forms of mediation that have no developmental ambitions.

Assuming a mediator wishes to encourage and support an individual's development to a new stage of meaning making in which the limitations of the present stage, with all of its implications for this and other conflicts, are transcended, how might one go about doing so? What types of third party assistance are likely to promote developmental transformation? Kegan likely would respond with a metaphor: the mediator must attempt to provide a bridge that is "well anchored on either side."<sup>57</sup> Individual growth is best facilitated by experiences that provide "an ingenious blend of support and challenge."<sup>58</sup> This occurs when the strengths of one's current way of making meaning are affirmed at the same time that one is sympathetically invited—and supported in one's efforts—to encounter and transcend its limitations.

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<sup>56</sup> As noted earlier, developmental progress in adulthood typically occurs rather slowly. A mediation, even one that consists of multiple sessions, is extremely unlikely to support a complete shift from one developmental stage to the next. As discussed more fully below, however, both the process design and the mediator's interventions may provide the types of support that can substantially contribute to an individual's development. Conflict situations arguably present special opportunities for personal growth.

<sup>57</sup> KEGAN, IN OVER OUR HEADS, *supra* note 6, at 37.

<sup>58</sup> *Id.* at 42.

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Kegan thinks of such simultaneous challenge and support in terms of a three-part effort involving “confirmation (holding on),” “contradiction (letting go),” and “continuity (staying put for regeneration).”<sup>59</sup> In the mediation context, *confirmation* might entail recognizing and affirming that which seems most at stake for a person involved in the conflict and responding sympathetically, but unanxiously, to the person’s insecurities about the situation. *Contradiction* might come in the form of encouragement to conceive of the conflict, or a particular issue or choice under consideration, in the way that an adult firmly centered in the next stage of development might see it. *Continuity* is about being present as one reintegrates one’s prior self-understanding (now as an *object* of awareness, rather than its unperceived governing principle) from the new developmental vantage point. A developmental transition is not complete until one is able to have a reasonably cordial relationship with the self-understanding that was repudiated during the transition.

For instance, in the first example above, the mediator might respond to Jim’s attempt to delegate his decisionmaking authority as follows:

This obviously is a very major decision, Jim. I certainly can understand your indecision and your desire to have someone else decide for you. I’ll be happy to ask you questions and provide some information that may be helpful to you as you think through the implications of Karen’s proposal. But, in the end, the decision about whether to agree to these terms, agree to other terms, or go to court is yours to make.

A response like this one provides small doses of the confirmation, contradiction, and continuity necessary to support Jim’s growth from the interpersonal stage of development to the institutional stage. It simultaneously acknowledges the genuineness of Jim’s predicament *as he sees it* (confirmation), insists upon a self-authoring response (contradiction), and offers nondirective assistance and support while he labors to produce a self-authoring response (continuity).

### IV. ASSESSING THE TRANSFORMATIVE POTENTIAL OF “TRANSFORMATIVE MEDIATION”

Is Bush and Folger’s approach to mediation likely to promote moral development? That is, is it well designed to support developmental transformation, as opposed to situational transformation? Which adults, if

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<sup>59</sup> See KEGAN, *THE EVOLVING SELF*, *supra* note 6, at 118.

any, might find in Bush and Folger's model an "ingenious mix of challenge and support" for their ongoing development?

### A. *The "Transformative Mediation" Process*

Bush and Folger distinguish their approach to mediation from three others that they consider nontransformative, contrasting it sharply, in particular, against the type of interest-based, or problem-solving, mediation practiced by many mediators<sup>60</sup> and described in books like *Getting to Yes*.<sup>61</sup> According to Folger and Bush, the following ten characteristics distinguish transformative approaches to mediation from nontransformative approaches:<sup>62</sup> (1) an opening statement that frames the mediator's role and objectives in terms of empowerment (strengthening of self) and recognition (responsiveness to others);<sup>63</sup> (2) responsibility for the outcome is in the party's hands;<sup>64</sup> (3) the mediator does not judge the parties' perspectives and choices;<sup>65</sup> (4) the mediator takes an "optimistic view of the parties' competence and motives";<sup>66</sup> (5) expression of emotion is permitted and acknowledged;<sup>67</sup> (6) uncertainty and confusion are embraced, and the parties allowed to explore them;<sup>68</sup> (7) the mediator keeps the parties' attention focused on their interaction "in the room," and discourages "backing up" to a broader view on the identification and solution of the problem";<sup>69</sup> (8) discussion of the past is encouraged;<sup>70</sup> (9) the mediator recognizes that the conflicts may have an extended life, so that the intervention is viewed "as one point in a larger sequence of conflict interaction";<sup>71</sup> and (10) a mediation is "successful" if the slightest degree

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<sup>60</sup> See BUSH & FOLGER, *supra* note 2, at 15-16.

<sup>61</sup> See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

<sup>62</sup> See Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 266-76 (1996).

<sup>63</sup> See *id.* at 266.

<sup>64</sup> See *id.* at 267.

<sup>65</sup> See *id.* at 268.

<sup>66</sup> *Id.* at 269.

<sup>67</sup> See *id.* at 271.

<sup>68</sup> See *id.* at 272.

<sup>69</sup> *Id.* at 273.

<sup>70</sup> See *id.*

<sup>71</sup> *Id.* at 274.



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of recognition or empowerment occurs.<sup>72</sup> As indicated earlier, the goal of their approach—and the reason they call it “transformative”—is the promotion of individual moral development, a goal which they see as having benefits for society as a whole.

Bush and Folger believe that moral growth occurs when people “develop a greater degree of both self-determination and responsiveness to others,” which they refer to as “empowerment” and “recognition,” respectively.<sup>73</sup> Empowerment occurs when parties “gain clarity about their goals, resources, options, and preferences” and are supported in their efforts to make “clear and deliberate decisions.”<sup>74</sup> Recognition occurs when parties “voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party, thereby expanding their perspective to include an appreciation for another’s situation.”<sup>75</sup> Parties are encouraged to “consider the other’s point of view” with respect to the conflict, and “relational issues . . . [are] mine[d] for recognition opportunities.”<sup>76</sup>

Transformative mediation is designed to create an environment in which moments of empowerment and recognition can occur repeatedly. Reaching settlement is not among the mediator’s objectives; indeed, one of the mediator’s goals is attempting *not* to influence the outcome in any way, even by predisposing the parties to think there should be an outcome of one kind or another.<sup>77</sup> The mediator makes an opening statement as the process begins, stressing the importance of recognition and empowerment, and indicating that settlement is but one possible outcome and “that mediation can be worthwhile even if settlement is not reached . . . .”<sup>78</sup>

While there is no set structure for the remainder of the session, Bush and Folger explain that the mediator’s moves give rise to a common pattern.<sup>79</sup> As the parties address each other and the mediator, and as they deliberate, the mediator continually seizes upon opportunities for empowerment and recognition.<sup>80</sup> This may take the form, for example, of

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<sup>72</sup> *Id.* at 275.

<sup>73</sup> *Id.* at 264.

<sup>74</sup> *Id.*

<sup>75</sup> BUSH & FOLGER, *supra* note 2, at 89.

<sup>76</sup> *Id.* at 101.

<sup>77</sup> *See id.* at 141–42.

<sup>78</sup> *Id.* at 142.

<sup>79</sup> *See id.* at 192–93.

<sup>80</sup> *See id.* at 193.

exploring the past in order to surface the parties' respective views of one another or of inviting a party to consider new ways in which the other's behavior could be understood.<sup>81</sup> When the opportunities for recognition and empowerment in a given exchange seem to be exhausted, the mediator attempts to generate further opportunities by redirecting the discussion in a manner that seems likely to produce them.<sup>82</sup> This cyclical process continues until all such opportunities appear to have been exhausted, at which point the mediator summarizes any progress that has occurred with respect to empowerment, recognition, and other matters, and helps the parties produce a written document or agreement if they wish to do so.<sup>83</sup>

### *B. Is Transformative Mediation Developmentally Transformative?*

Bush and Folger's ideal of "compassionate strength" seems to correspond to Kegan's interindividual stage of development. Compassionate strength is the hallmark of a worldview they call "relational."<sup>84</sup> They sharply distinguish their relational worldview from its "organic" and "individualistic" counterparts,<sup>85</sup> which appear to correspond roughly to the perspectives of adults at the interpersonal and institutional stages, respectively, in Kegan's model of development. Thus, it seems that Bush and Folger hope to encourage disputants to grow to a stage of development that roughly corresponds to Kegan's interindividual stage. If this is so, we must ask whether their process actually supports growth toward the interindividual stage of development. If it is capable of doing so, we also must ask whether all adults can benefit from the process. The answers to these questions depend upon both the structure of the process and a participant's ability to harness whatever potential for developmental transformation it offers.

#### *1. Transformative Mediation and Adults at the Interpersonal Stage of Development*

As we saw earlier, adults at the interpersonal stage of development can consider and attune themselves to others' perspectives, but they have

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<sup>81</sup> See *id.* at 192.

<sup>82</sup> See *id.* at 204.

<sup>83</sup> See *id.* at 200-04.

<sup>84</sup> BUSH & FOLGER, *supra* note 2, at 242; Folger & Bush, *supra* note 6, at 15.

<sup>85</sup> See BUSH & FOLGER, *supra* note 2, at 245.

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difficulty acting on their own authority. Thus, an adult at the interpersonal stage may find an appropriate degree of developmental challenge in transformative mediation to the extent that the mediator's emphasis on "empowerment" translates into an insistence that the party articulate and assert his own interests. But, an emphasis on empowerment of this type, which amounts to a *contradiction* of the party's present self-understanding, must be accompanied both by *confirmation* of the party's predicament as she sees it and by some assurance of *continuity* between what the party presently values and the values implicit in the new perspective that the party is asked to embrace. Mere insistence on self-authoring behavior is unlikely to present a bridge secure enough for the party to consider crossing.

On the other hand, transformative mediation's emphasis on "recognition" raises the rather complicated issue of whether the ongoing development of an adult at the interpersonal stage is truly supported by the type of perspective-taking and accommodation that Bush and Folger advocate. Because an adult at this stage of development is "made up" at any given moment by her relationships, and because those relationships which exist within the context of presently shared space may have special, if temporary, influence, the adult at this stage of development has little ability to construct a perspective that is his "own" over and apart from others' perspectives. This presents the possibility that, so far as the development of an adult at the interpersonal stage is concerned, transformative mediation's dual emphasis on empowerment and recognition may be operating at cross purposes.

As discussed more fully below, the institutional stage of development can be experienced in a way that emphasizes connection and responsiveness to others.<sup>86</sup> It does not, as Bush and Folger seem to be aware, necessarily involve highly individualistic behavior or decisions. Perhaps ideally, a party at the interpersonal stage of development would experience transformative mediation as an invitation to transition toward an other-responsive form of institutionalism. An invitation of this type might provide the sense of continuity needed to support the party's development: one who is shown the possibility of an independence that affirms one's connections with others may indeed see in it a bridge secure enough to consider crossing.

The mediator moves and responses advocated by Bush and Folger, however, arguably risk amplification of the confusion and ambivalence

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<sup>86</sup> See KEGAN, IN OVER OUR HEADS, *supra* note 6, at 221-22.

already experienced by an adult at the interpersonal stage of development. A mediator wishing to encourage a party's development from the interpersonal to the institutional stage would be wise to emphasize the empowerment side of Bush and Folger's empowerment-recognition equation, in effect co-opting the recognition side and placing it in the service of empowerment. In other words, creating opportunities for mutual "recognition" may be useful primarily as a way of providing confirmation of the party's present way of making meaning *for the purpose of making self-authoring behavior seem less risky*. Recognition might then mean seeing another party as a distinct individual with her own needs and concerns—needs and concerns that one cares about, at least in part, because their satisfaction may be a prerequisite to satisfaction of one's own distinct needs and concerns. This is precisely the definition of "recognition" that Bush and Folger resist.

An effective invitation to transition from the interpersonal stage to the institutional stage must encourage a type of relatedness that is qualitatively different from the over identified mutuality which is characteristic of the interpersonal stage. For parties at the interpersonal stage of development, "transformation" is about the development of a distinctive identity. This goal may not be well served by the type of recognition that Bush and Folger advocate, which involves a "*letting go*—however briefly or partially—of one's focus on self and becoming interested in the perspective of the other party as such, concerned about the situation of the other as a fellow human being, not as an instrument for fulfilling one's own needs."<sup>87</sup> This type of "recognition" encourages a form of relatedness which, to borrow a phrase from Kegan, may be "over the heads" of adults transitioning away from the interpersonal stage of development. It actually may be counterproductive to the development of these adults. One must be able to focus genuinely on oneself before one can "let go" of that focus; focusing on oneself in the "individualist" sense of which Bush and Folger ultimately disapprove is precisely what the adult at the interpersonal cannot yet do.

The type of relatedness that needs to be encouraged as one transitions from the interpersonal stage of development is a relatedness which, to a significant degree, subordinates itself to the individual's emerging sense of himself as a distinct person. This is not to say that a mediator whose objectives include developmental transformation should not encourage genuine demonstrations of mutual understanding. A mediator merely should

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<sup>87</sup> BUSH & FOLGER, *supra* note 2, at 97.

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recognize that for a party who is just beginning to transition away from the interpersonal stage of development, there is a fine and often porous line between taking another's perspective and sacrificing one's own interests.

From the mediator's perspective, this means that the type of "recognition" that one asks of a party at the interpersonal stage of development must not invite the party too far into the other's experience; it must take care to emphasize the parties' distinctiveness at the same time that it invites a party at the interpersonal stage of development to consider the other's perspective. At most, the mediator should invite a party at the interpersonal stage of development to consider and demonstrate an understanding of the ways others might see things, all the while reinforcing the parties' distinctiveness. In the context of a mediation between two neighbors—one of whom, Simon, the mediator believes is viewing the conflict through the lens of interpersonalism—an appropriate (if somewhat exaggerated) mediator move encouraging recognition might go as follows:

Simon, you obviously are not in Jenny's shoes. As we can see, you have your own concerns and objectives, some of which Jenny shares, but some of which she doesn't. That's normal. The closest of friends obviously can have differences that don't threaten their relationship, so there's no reason why the same shouldn't be true of neighbors. Regardless of what the two of you decide about the fence, it's important that you *both* express whatever seems most important to you in relation to this dispute. If the two of you decide you want to settle the dispute, any agreement obviously also must address each of your most important concerns and objectives. Jenny says she was expecting a different kind of fence based on the discussion you had before it was built. I don't want you to lose sight of your own recollection of that discussion and your opinion about what it meant, but perhaps you can try to imagine and describe how the conversation might have looked from Jenny's perspective.

In sum, if a mediator wishes to support the development of a party at the interpersonal stage of development, moves and responses geared toward producing moments of recognition also should reinforce the parties' separateness. They should contain an "empowering" subtext. Though they need not totally discourage other-responsiveness, empowerment should be emphasized over recognition.

Two important points about the constructive-developmental perspective on adult development—alone and in relation to Bush and Folger's model of mediation—are implicit in the discussion so far. First, developmental stages cannot be skipped. As I indicated earlier, Folger and Bush's vision of full maturity seems to correspond to Kegan's interindividual stage of

development. Its hallmarks are forms of “empowerment” and “recognition”—and, most significantly, a balance between them—of which adults at the interpersonal and institutional stages of development are not yet capable. Research done by Kegan and his colleagues suggests that adoption of Bush and Folger’s “relational” worldview—or their “individualist” worldview, for that matter—is not merely a matter of choice, as Folger and Bush seem to believe.<sup>88</sup> Before a party at the interpersonal stage of development can provide the form of *recognition* Bush and Folger advocate, he first must be able to exercise the form of *empowerment* they advocate. In other words, one needs to develop the first muscle sufficiently before one can fully exercise the second. Once again, this does not mean that the party at the interpersonal stage should not be encouraged to demonstrate what we might call “recognition.” It simply means that the form of recognition offered must be somewhat different than that which Bush and Folger seem to encourage. When it comes to developmentally-supportive empowerment and recognition, one size does not fit all. Mediator moves and responses that provide developmental support to one party may provide no support to another, or they actually may confound development.

Second, it follows that genuine development is occurring when an adult transitions from the interpersonal stage to the institutional stage, even though an adult at the institutional stage does not yet view conflict or other social interaction in a way that is wholly consistent with Bush and Folger’s relational worldview.

## *2. Transformative Mediation and Adults at the Institutional Stage of Development*

The dual purposes of empowerment and recognition present a different challenge for the mediator who wishes to foster the development of an adult

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<sup>88</sup> See Folger & Bush, *supra* note 62, at 267-68. It arguably is possible for an individual at the interpersonal stage of development to be *socialized* to speak and act in ways that bear some resemblance to Bush and Folger’s relational worldview (or their “individualist” worldview, for that matter), but such behavior would not be the product of an authentic internalization of that perspective. In other words, it would not be a *developmental* achievement. Nor could this person consistently enact a relational (or individualist) worldview. Likewise, it is arguably possible for an individual at the institutional stage of development to speak and act in ways that bear some resemblance to Bush and Folger’s relational worldview, but, once again, this behavior would not be the product of an authentic internalization of that perspective. She would be unable to embody and consistently and congruently enact the “relational” perspective.

at the institutional stage. The adult at this stage of development is in less need of empowerment in the sense in which that term is used by Bush and Folger. To be sure, many of the mediator moves that Bush and Folger classify as empowerment may be quite *helpful* to an adult at the institutional stage—for example, assisting in the organization and analysis of issues, helping identify resources in the party's possession that might contribute to a settlement, and helping one assess the strengths and weaknesses of one's case<sup>89</sup> (all of which, by the way, many "problem-solving" mediators also regularly do). But, such assistance seems to have more of an administrative quality than a "self-strengthening" quality when viewed from the perspective of an adult at the institutional stage of development. The empowerment events identified by Bush and Folger—for example, realization of what matters most to oneself and why, how such concerns are implicated in the present conflict, and making conscious decisions for oneself<sup>90</sup>—already are within the grasp of these adults. These most often are not "transformative" moments in a developmental sense.

Transformative mediation nonetheless may help facilitate the transition from the institutional order to the interindividual order if the mediator's emphasis on recognition invites an adult at the institutional stage of development not only to a better understanding of another's perspective, but to an expanded understanding of *oneself*. As we have seen, an adult at the institutional stage of development already is quite capable of seeing a situation from another's point of view without losing possession of one's own perspective—even if one is resistant to doing so as a mediation session begins. One can take a perspective on another's experience and understand, for example, why the other might experience as unsatisfactory something which, to one's own way of thinking, is quite agreeable. Moments of recognition like this undeniably may be significant for one or both parties, for the relationship between the parties, and perhaps even, as Bush and Folger contend, for society as a whole. And, as is Bush and Folger's hope, the party providing the recognition may even realize "that, beyond possessing the *capacity* to consider and acknowledge the other's situation, he has the actual *desire* to do so."<sup>91</sup>

Perspective change such as this seems generally positive, and I believe it has potentially important moral *value*. Yet, one must ask whether it truly is indicative of moral *development*; that is, whether it is evidence of

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<sup>89</sup> See BUSH & FOLGER, *supra* note 2, at 85–89.

<sup>90</sup> See *id.*

<sup>91</sup> *Id.* at 90.

movement toward an entirely new vantage point from which selfhood and the nature of the relationships between selves are constructed, as opposed to the exercise of one's existing capacities in a more compassionate way. The question is an important one, because, as we saw earlier, adults at the institutional stage of development, even at their conflictual best, still have great difficulty resolving many conflicts, particularly where core identity issues are involved. Development beyond the institutional stage requires more than reciprocal appreciation of "your perspective" and "my perspective." In fact, the very notion that one has a single, stable perspective or unitary collection of interests must be surrendered as one develops beyond the institutional stage.

It may be possible for a mediator to promote a form of recognition that invites an adult at the institutional stage of development not only to desire to see how another sees things, but to begin to glimpse the internal diversity within oneself. In a paradoxical sense, recognition at the interindividual stage of development is as much about oneself as it is about others. For the party at the institutional stage, development occurs to the extent that one returns from inquiry into another's perspective saying, in effect, "I now see parts of *myself* that I've never seen. I recognize features of myself that previously were hidden or denied."

In response to Susan's statement to her business partner, Mike, in the example above,<sup>92</sup> the mediator might ask:

Susan, you just said you understand how Mike sees things. Is there any part of you that sees things the same way, or perhaps even in some way or ways that are different than either of the perspectives that the two of you have expressed so far? If so, what are the implications of this multiplicity of perspectives for how you understand yourself, Mike, and the relations between you, including this conflict?

Unless a mediator encourages this type of "recognition" from parties at the institutional stage of development—most likely through questions and moves that would seem a bit strange to some mediators and parties, and perhaps also inappropriately close to psychotherapy to some—I doubt whether "transformative mediation" (as defined by Bush and Folger) holds much developmental potential for these individuals. Where empowerment needed to be emphasized when dealing with a party at the interpersonal stage of development, recognition of the special sort just described must be emphasized by a mediator who wishes to support the development of an

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<sup>92</sup> See example discussed in Part II.A.2, *supra*, of this Article.



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adult from the institutional to the interindividual stage. Some attention to empowerment (in the sense of a continued recognition of the parties' distinct identities) is necessary to provide confirmation of the party's current way of making meaning about herself in relation to others, but the focus this time must be upon a special brand of what Bush and Folger might still wish to call "recognition."

### V. DEVELOPMENTAL TRANSFORMATION AND PROBLEM SOLVING

Interestingly, the problem-solving orientation within mediation that Bush and Folger critique and characterize as nontransformative arguably supports a developmental transformation equally well for adults at or transitioning from the interpersonal stage of development. Mediators with a facilitative, nondirective, problem-solving orientation encourage parties to identify and articulate their own interests,<sup>93</sup> which is a form of "empowerment" that supports the development of adults at the interpersonal stage. Many problem solving mediators also encourage parties to demonstrate empathy for each other. At least some of them conceive of the empathy in a way that may be somewhat less likely than Bush and Folger's approach to work against the ongoing development of a party transitioning to, but not yet fully settled in, the institutional stage of development.<sup>94</sup>

Folger and Bush claim that "the self-referential approach to interests that lies at the heart of the problem-solving orientation is inconsistent with the other-directed nature recognition."<sup>95</sup> As we have seen, however, a form of recognition that also *encourages* self-reference and assertion of one's own interests actually holds more transformative potential than the type of recognition advocated by Bush and Folger for the many adults who are at the interpersonal stage of development (or transitioning from it to the institutional stage). Contrary to Bush and Folger's claims about problem-solving mediation's inability to support parties' moral development,<sup>96</sup> some forms of skillfully practiced problem-solving mediation may promote the

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<sup>93</sup> See, e.g., FISHER ET AL., *supra* note 61, at 40-55; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 804-07 (1984).

<sup>94</sup> See, e.g., Robert Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217, 219-20 (1996).

<sup>95</sup> Folger & Bush, *supra* note 6, at 25 n.6.

<sup>96</sup> See BUSH & FOLGER, *supra* note 2, at 81.

development of adults at the interpersonal stage of development as well as, or perhaps even better than, Bush and Folger's model.

It appears, however, that neither Bush and Folger's approach nor the type of problem-solving mediation just described is particularly well-designed to provide developmental support to adults at (or transitioning from) the institutional stage of development. Bush and Folger's model arguably is intended to support adults at precisely this phase in their development.<sup>97</sup> As indicated above, Bush and Folger's model probably could be modified to provide developmental support to these parties.<sup>98</sup> Likewise, a problem-solving approach to mediation could be practiced in a way that would provide similar developmental support.

As explained above, from a constructive-developmental perspective, the key to transformation—in the sense of moral development—is the experience of contradiction and confirmation, of challenge and support. For the party transitioning from the interpersonal to the institutional stage of development, the requirements of problem solving—identifying and asserting one's needs, concerns, and interests, for example, and imaging, evaluating, and selecting among options designed to satisfy them—address the "challenge dimension" of this equation. For the party transitioning from the institutional stage to the interindividual stage, these activities provide confirmation of one's present way of making meaning. They may provide a rationale for participating in the process and a platform from which one confronts the challenges posed by a mediator's moves designed to invite a shift away from an institutional understanding of oneself, others, and the nature of conflict. Thus, even for a transformative mediator, problem solving may play a critical role for those at or transitioning away from the two most common stages of adult development. The goals and techniques of problem solving are not necessarily at odds with those of transformation.

Bush and Folger are of course right to suggest that moral development is unlikely to occur to the extent that problem solving means that the mediator tells the parties how to settle their dispute. Naturally, the parties must do the work. And, a mediator who wishes to support the development of parties at (or transitioning away from) the institutional stage of development also must not let the parties themselves rush to a "quick fix" solution, because—to borrow Kegan's phrase—the transition from the institutional to the interindividual stage to some extent involves letting our problems "solve us." Generally speaking, however, a process that

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<sup>97</sup> See the discussion of Bush and Folger's relational worldview, *supra* Part III.

<sup>98</sup> See discussion *supra* Part IV.B.

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encourages parties to generate options, evaluate and select among them, and make commitments to one another may have transformative potential for many parties. It is simply wrong to suggest, as do Bush and Folger, that approaches to mediation that involve problem solving cannot contribute to a party's moral development.

Just as mediators interested in moral development may make productive use of problem solving approaches to mediation, mediators who wish to facilitate party problem solving may benefit from acquaintance with the dynamics of individual development. A mediator equipped to respond to the parties' meaning making efforts within a mediation arguably is better able to help them identify and articulate developmentally influenced needs, fears, concerns, and interests, understand the dilemmas inherent in the choices with which they are faced, appreciate and work through relational dimensions of the conflict, make use of the strengths of their current developmental capacities, and overcome challenges presented by current developmental limitations.

## VI. SOME IMPLICATIONS FOR PRACTICE

If one considers it appropriate to relate to parties in ways that tend to support their ongoing development, whether as a primary purpose of the mediation or as an aid to problem solving, a range of difficult practical issues must be addressed. Two such issues are developmental stage assessment, on the one hand, and dealing with developmentally diverse parties on the other.

### *A. Developmental Stage Assessment*

Mediators interested in responding to parties in ways that tend to support their development must be able to recognize developmental stage differences—a task that becomes more complicated when parties are transitioning between stages, as many adults are. While many serious students of constructive-developmental psychology do become proficient in making reasonably accurate, informal, tentative assessments of others' ways of making meaning, formal assessments typically require a specialized interview or completion of a special questionnaire, the administration of which requires specialized training. While an informal assessment of a party's location on the developmental continuum may be sufficient for purposes of making judgments about the types of moves and responses that might lend support to a party's ongoing process of development, mediators

wishing to integrate the constructive-developmental perspective into their practice must be trained to make such judgments. It probably is safe to say that few mediators presently have such training.

### *B. Developmentally Diverse Parties*

Assuming one had the requisite training and skills to integrate principles of constructive-developmental psychology into one's mediation practice, conducting a mediation in a manner designed—perhaps among other things—to support the parties' development might not be very difficult, assuming the parties are at roughly the same point on the developmental continuum. However, whenever parties to a mediation are at (or transitioning between) different developmental stages, as must often be the case, efforts to support their development become more complicated. As we have seen, parties transitioning from the interpersonal stage to the institutional stage ought to be encouraged to practice a different sort of recognition than those transitioning from the institutional to the interindividual stage.

Efforts to employ two different notions of recognition in a single mediation session are risky, because different treatment of the parties, if perceived, may give rise to questions about the mediator's impartiality. They may also send mixed messages that could be difficult or impossible for some parties to untangle. A mediator might have to be transparent<sup>99</sup> about his party-specific developmental purposes and desired impacts in response to such questions.<sup>100</sup> If a mediator were fully transparent about her intentions and desired impacts, however—explaining, for example, that the purpose of a particular question is to promote party A's moral

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<sup>99</sup> See Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 2-3 (1997).

<sup>100</sup> We also must ask whether a "transformative" mediator's developmental purposes should be disclosed with at least some minimal degree of transparency at the beginning of the process for the purpose of obtaining the parties' informed consent to participation, particularly if the mediator does not intend to introduce the prospect of and facilitate party problem solving. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 819-27 (1999) (developing the notion of "participation consent" and advocating the disclosure of the "the nature and purposes of the mediation process, the mediator's role, and the norms that will govern the process"). It probably is fair to say that most parties agree to mediation with the expectation that its primary purpose is problem solving rather than active support of their moral development.

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development and that the purpose of another, obviously different, sort of question is to try to support party B's development to the stage presently occupied by party A—many parties probably would object to the entire process. While this extreme level of transparency may not be desirable or appropriate, it is hard to imagine how a mediator who adheres strictly to Bush and Folger's model could respond to parties' concerns in a way that would be truthful and that also would inspire continued trust in the process. Should one party or the other object to the process on the basis of different treatment, perhaps the best a mediator could do is explain that she believes the parties have different perspectives regarding one another and the conflict, and that she is doing her best to respond in ways that are responsive to each perspective.

## VII. CONCLUSION

Where transformative mediation connotes an approach to practice that seeks to encourage self-determination and to promote mutual understanding and genuine demonstrations of empathy, the idea of "transformation" is relatively unproblematic. If a mediator wishes to promote transformation in the sense of individual moral *development*, however, the matter becomes much more complicated. Transformation of this more ambitious type must take into account not only the design of a particular process, but participants' capacity to meet its developmental demands. As presently constructed, Bush and Folger's model of mediation appears at best to hold transformative potential for a fraction of all adults, and it probably does so no more effectively than a common approach to problem solving mediation that they criticize.

Contrary to Bush and Folger's claims that problem solving and developmentally transformative purposes cannot cross-fertilize, I believe they often are supportive of one another. Mediators who view themselves as problem solvers face many problems that cannot be solved without process designs, and mediator moves and responses within them, which (perhaps unintentionally) challenge parties to overcome their developmental limitations and provide them with support as they attempt to do so. Similarly, mediators who view themselves as agents of individual moral development will contribute to the growth of few parties, if any, without a willingness to encourage and facilitate party problem solving where necessary to provide the challenge and support that produces such growth.

Whatever the limits of mediation may be—whether for problem solving, support of individual moral development, promotion of social or

political change, or other purposes currently debated and yet to be imagined—it seems unlikely that they will be defined by rigid distinctions between ideological orientations to practice.